

IN THE HIGH COURT OF DELHI AT NEW DELHI

FAO(OS) 127/2007

North Eastern Handloom
& Handicraft

...Petitioner
through Mr. R.K. Singh with
Mr.Nikhilesh Krishan, Advs.

Versus

Sports Station India Pvt. Ltd. ...Respondent
through Mr. Viplav Sharma
with Mr. Alishan Naquee &
Mr. Prashant Narain, Advs.

WITH

FAO(OS) 148/2007

Amitava Mookerjee ...Petitioner
through Mr. Gourab Banerji,
Sr. Adv. with Mr. Saurav
Aggarwal, Mr. Arjun Krishan,
Mr. T.M. Singh & Mr. Dinesh
Kumar, Advs.

Versus

Sports Station (India) Pvt. Ltd... Respondent
through Mr. R.K. Singh with
Mr.Nikhilesh Krishan, Advs.
for Respondent No.2

Date of Hearing : May 24, 2007

Date of Decision : July 09, 2007

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE J.P. SINGH

1. Whether reporters of local papers may be

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| allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be reported in the Digest? | Yes |

J U D G M E N T

VIKRAMAJIT SEN, J.

1. We have heard learned counsel for the parties in great detail and, therefore, proceed to decide the Appeals on merits.

2. A neat question of law has arisen before us in these two Appeals. It pertains to the proper forum for adjudication of disputes, through arbitration, in respect of immovable property at 17, Shakespeare Sarani, Theatre Road, Kolkata-71. The landlady of this property is Mrs. Lila Mookerjee who has constituted her son, Mr. Amitava Mookerjee as her general attorney having allowed him the use of 2200 square feet of 'super area' on the ground and first floor ("shop space" for short). In this capacity Shri Mookerjee had, in May 2000, entered into a Joint Venture Retail Agreement (JVRA) with Sports Station India Pvt. Ltd. (in brief Sports Station) the Respondent in both Appeals, the salient clauses/terms for the present controversy are that possession of the shop space was handed over to Sports Station and that the latter could further appoint

its franchisee for "Nike" products. For this arrangement the consideration was Rs.1,70,000/- or 8%(5% in respect of reduction/clearance sales) payable by Sports Station to Mr. Mookerjee. The JVRA is for a period of nine years with renewal options, but is terminable by Mr. Mookerjee if Sports Station commits a material breach of its terms. Clause 38 is the Arbitration Agreement which specifies, inter alia, that arbitration proceedings would be held in Calcutta, and that Calcutta Courts would have jurisdiction. In fact, considerable litigation between these two parties has already commenced and is pending.

3. The second Agreement dated 29-4-2003 is between Sports Station and North Eastern Handloom and Handicrafts (hereinafter 'North Eastern'). By its terms Sports Station is liable to pay the rent of the premises, the Ground Floor (showroom) of which are to be used for as a showroom and the First Floor (stockroom) for storage of stock. North Eastern has contracted to act as the Management Agent of Sports Station on commission basis; sales would be effected at prices determinable by Sports Station. This Agreement was to be co-terminus with the 'Lease Agreement' [reference obviously being to the JVRA]. Clause 17 is the Arbitration Agreement between Sports Station and North

Eastern, inter alia stipulating that arbitration proceedings shall be held in New Delhi and nowhere else and that Courts in Delhi shall have exclusive jurisdiction over disputes between these two parties.

4. Sports Station filed a Petition under Section 9 of the Arbitration and Conciliation Act, 1996 (A & C Act for short) seeking a restraint against North Eastern from interfering with the peaceful possession and functioning of the Sports Station and its Representatives from the showroom and also for restraining North Eastern from stocking or selling its own merchandise from the showroom; and for restraint order against North Eastern from removing and selling the stocks lying at the First Floor. Yet another application has been filed by Sports Station inter alia praying for injuncting North Eastern from selling any products from the shop space. Neither Mr. A. Mookerjee nor Mrs. L.Mookerjee have been impleaded in the proceedings initiated by the Respondent Sports Station in this Court. Consequently, neither of the Mookerjees have been granted a hearing by the learned Single Judge and therefore their interests have been ignored. North Eastern has filed FAO(OS) No.127/2007 since the learned Single Judge has restrained it "from interfering with the

peaceful possession and functioning of Sports Station and its representatives from the showroom situated at 17, Shakespeare Sarani, Theatre Road, Calcutta (and) from stocking any of its products at the said premises or carrying on sale of any goods from the said showroom with immediate effect". The Appellant, North Eastern, has also been directed to remove himself and his stocks and goods lying in the said premises within two weeks. By the impugned Order the learned Single Judge had also directed the Commissioner of Police, Lal Bazaar, Kolkata to ensure strict compliance of this order. The learned Single Judge had also appointed Shri R.C. Chopra, retired Judge of this Court as the Sole Arbitrator obviously in respect of disputes pending between Sports Station and North Eastern. We understand that arbitration proceedings have already commenced.

5. Mr. Mookerjee has filed FAO(OS) 148/2007 impleading both Sports Station and North Eastern and praying that the said impugned Orders dated 22.3.2007 passed by the learned Single Judge be set aside to the extent that they adversely affect his rights. Locus standi of the Appellant, Mr. Mukherjee, has not been challenged before us. However, had this been done by Sports Station, it would have brought to the fore the significance

of passing an order which impinges upon the rights of a party which is not before the Court, and in the circumstances of the present case, which is also not a signatory to the arbitration clause which predicates the jurisdiction under Section 9 of the Arbitration and Conciliation Act, 1996. Mr. Mookerjee has emphasised that Sports Station has willfully suppressed any mention of litigation pending in the High Court of Calcutta as well as in the Hon'ble Supreme Court of India even in the face of adverse observations by the Single Bench and the Appeal Bench of the Calcutta High Court. Sports Station has also failed to disclose that it had terminated the contract between North Eastern and itself as far back as on 24-12-2004. Had this fact been disclosed the learned Single Judge would indubitably have considered the appropriateness or necessity of passing injunctive orders in a stale matter. From documents filed it appears that on 28.7.2005 a Receiver had been appointed by the Calcutta High Court at the instance of Sports Station which, by a detailed Order dated 23.8.2005, came to be recalled; the application itself was dismissed. Indira Banerjee, J., inter alia, applied the dictum of *Indian Oil Corporation Ltd. -vs- Amritsar Gas Service*, 1991(1) ALR 97 = 1991(1) SCC 533 viz. that if a contract is determinable the remedy for its breach would lie in a claim for damages, and

for this reason an injunction cannot be issued. The application was also dismissed for the reason that material facts had been suppressed by Sports Station. The Single Bench noted that the contract had been entered into with Mr. Amitava Mookerjee who had not been impleaded before that Court. Sports Station unsuccessfully filed an Appeal which was rejected by Orders dated 20.1.2006. As already mentioned above, an Appeal has been preferred by Sports Station to the Hon'ble Supreme Court in which notice has been issued but no interim Orders have been passed.

6. Sports Station has made no mention whatsoever of the legal proceedings before the Single Bench, Division Bench of the Calcutta High Court, as also before the Hon'ble Supreme Court of India. Sports Station has not impleaded either Mrs. Lila Mookerjee or Mr. Amitava Mookerjee, even though the gravamen and effect of the injunction prayed for directly impacts upon these two persons. A copy of the T.No.182/2007 in A.P. No.137 of 2007 filed by Mr. Amitava Mookerjee against Sports Station has been filed by Mr.A.Mookerjee along with the Appeal. Upon gaining knowledge of the impugned Orders and suffering its

consequences Mr.A.Mookerjee filed a fresh action in the Calcutta High Court, and filed the present Appeal.

7. Indira Banerjee, J., by Order dated 30.3.2007, directed that the “ pad locks at the show room in question should forthwith be removed and the petitioner be given access for the limited purpose of operating the pump,the switch of which is located at the show room in question. The show room shall remain in the possession of a Special Officer of this Court. Mr Saugata Bhattacharya, Advocate of this Court is appointed Special Officer. The Special Officer shall make an inventory of the show room in question and submit a report to this Court. The Special Officer shall allow the petitioner to operate the pumps as directed above”. Thereafter, Sanjib Banerjee, J., on 25.4.2007, observed that - “In these proceedings, arising out of the alleged tenancy agreement between the parties herein, there can be no issue arising as to the right of the applicant in respect of any goods. Even if this application were to be treated as an application in the nature of pro inter esse suo as suggested by the applicant, the applicant's title in respect of the stocks that he seeks to remove must first be established before the order that he seeks in terms of prayer (b) can be passed. Since the disputes which can form

the subject matter of the reference will not cover the disputes sought to be raised by the applicant herein, this application cannot be entertained and the same is dismissed. However, the Special Officer will be at liberty to take such steps that he deems fit and if, according to the Special Officer , he is required to act in terms of any order passed by any Court, it will be open for him to do so.”

8. As we have already narrated the JVRA between Mr. Mookerjee and Sports Station contains an arbitration clause stipulating inter alia that Courts in Calcutta would have jurisdiction and the arbitration proceedings would also be held in Calcutta. This Clause has been acted upon by the Respondent Sports Station in Calcutta. There is also an Agreement entered into between Sports Station and North Eastern which inter alia stipulates to the contrary, i.e., that Courts in New Delhi would have jurisdiction and the venue of arbitration between these two parties would also be in New Delhi. The impugned injunction Order, however, has been passed in respect of immovable property situated in Calcutta, without adverting to or granting a hearing to the owners thereof or to the persons that would be directly affected by the injunction. These impugned Orders have

been passed against persons who are not party to the arbitration clause which clothes Courts in Delhi with jurisdiction. In the present situation a number of disputes that can arise between the two sets of parties who have contracted with each other. So far as Mr. Mookerjee and Sports Station are concerned they may have commercial disputes as well as disputes pertaining to the occupation of the shop space. Obviously these disputes cannot be ventilated in any Court other than those situated in Calcutta, either keeping in view the express terms of the Agreement between them, or by the general principles of law universally accepted that disputes relating to immovable property must be brought within the Courts holding territorial sway over them. This principle is so well entrenched in jurisprudence that one does not necessarily have to advert to Section 16 of the Code of Civil Procedure (CPC). We also note that Section 20 of the CPC opens with the words "Subject to the limitations aforesaid" [i.e. Section 16] which enjoins the institution of suits for the recovery, partition, foreclosure, sale or redemption or determination of any other right or interest in immovable or for compensation for wrong to immovable property in the Court within the local limits of whose jurisdiction the

property is situate, or the defendant actually and voluntarily resides.

9. Mr. Sharma, learned counsel for Sports Station, argues that even if the CPC is applied, Section 20 would enable the Sports Station to institute proceedings in Delhi. This submission, however, is not correct for the reason that Section 20 cannot be applied contrary to the terms of Section 16. We may also record the argument of Mr. Sharma that the CPC does not apply to the (A & C Act). No doubt, Section 19 of the A & C Act states that the arbitral tribunal shall not be bound by the CPC or the Evidence Act, but that strictly applies to the conduct of arbitral proceedings. Since the CPC has been excluded only to this limited extent, it would be fair to conclude that it has not been excluded in other spheres. In any event, we would favour the view that the principle incorporated in Section 16 has assumed the nature of a grundnorm which has universal application even so far as the passing of interim Orders by Courts in arbitration proceedings. Same approach has been articulated by the Division Bench of the Karnataka High Court in *Globe Cogeneration Power Ltd. -vs- Sri Hiranyakeshi Sahakari Sakkere Karkhane Niyamit, Sankeshwar, Karnataka*, 2004(4) R.A.J. 263(Kar). The Hon'ble Supreme Court

has recently clarified in *Begum Sahiba Sultan -vs- Nawab Mohd. Mansur Ali Khan*, Manu/SC/1970/2007 that suits relating to immovable property must be entertained in strict conformity with Section 16 of the CPC, the only exception being orders which have efficacy because they demand the personal obedience by the Defendant to the Suit.

10. With due respect to the views and orders of the learned Single Judge we are of the opinion that the impugned Order cannot be sustained and must be set aside so far as it pertains to the immovable property situated at Calcutta. First and foremost, Courts in Delhi must decline to exercise jurisdiction over immovable property situate beyond its territorial boundaries. Secondly, Orders passed under Section 9 of the A & C Act are equitable in nature, and if a party approaches the Court with unclean hands by suppressing material facts which ought to have been pleaded and specifically brought to the notice of the Court, such a party would be disentitled to any relief. Sports Station ought to have disclosed all details of litigation pending between Mr. Mookerjee and itself in the High Court of Calcutta leading to the Appeal before the Hon'ble Supreme Court. We find no warrant whatsoever for the failure to do so and on this ground set

aside the directions passed by the learned Single Judge in respect of the property at 17, Shakespeare Sarani, Theatre Road, Kolkata-71. Thirdly, Section 9 of the A & C Act empowers a Court to pass interim measures of protection in respect of the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement or securing the amount in dispute in the arbitration or detention, preservation or inspection of any property which is the subject matter of the disputes in arbitration. There is an arbitration clause between Sports Station and North Eastern and disputes have arisen between them emanating from and in connection with the said Management Agreement. So far as the shop space is concerned Sports Station had already invoked the jurisdiction of the Calcutta Courts, prior to its jural foray in this High Court. Section 42 of the A & C Act cannot be ignored. It demands that with respect to an arbitration agreement an application has to be made in that court, and in no other Court, where the first action has been instituted. Any dispute pertaining to the immovable property in Calcutta would, therefore, even on the application of Section 42 of the A & C Act be maintainable only in Calcutta. Fourthly, the principles of constructed *res judicata* would come into play so far as the immovable property is concerned because

of prior litigation pending between Sports Station and Mr. A. Mookerjee. Fifthly, Orders under Section 9 of the A & C Act would ordinarily issue in respect of persons who are party to the arbitration clause. It would bear repetition that Mr.A.Mookerjee is not a party to the Management Agreement between Sports Station and North Eastern. We clarify that the Arbitration Agreement between Sports Station and North Eastern has to be honoured. Prima facie, it concerns the sale and stocking of merchandise directed to be sold at Calcutta. This essentially is a mercantile dispute, distinct from a dispute relating to immovable property. Sixthly, the Agreement between Sports Station and Mr. Mookerjee on the one hand and Sports Station and North Eastern on the other are inherently and intrinsically terminable in nature. As already noticed above ***Amritsar Gas*** is high authority for the proposition that a remedy for a breach of termination of contract is not by way of its specific or continued enforcement but by an action for damages.

11. In this analysis the impugned Order dated 22.3.2007 is set aside insofar as it restrains Mr.A.Mookerjee from interfering with the alleged possession of Sports Station at 17, Shakespeare Sarani, Theatre Road, Kolkata-71. We clarify that the Orders

appointing the Sole Arbitrator to decide all other disputes between Sports Station and North Eastern shall continue in terms of the impugned Order. We make no observations or reflections on the disputes inter se Sports Station and Mr. Mookerjee since in our opinion this Court does not possess territorial jurisdiction in that regard. These disputes would perforce be decided by the High Court of Calcutta.

12. We impose costs of Rs.20,000/- on Sports Station for suppression of material facts. Both Appeals are decided in these terms.

(VIKRAMAJIT SEN)
JUDGE

(J.P. SINGH)
JUDGE

July 09, 2007
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